NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

James Jackson, et al

Petitioners

vs.

The Fairfax County Board of Zoning Appeals, and

The Trustees of Antioch Baptist Church

Respondents

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF FAIRFAX COUNTY VIRGINIA

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are the decisions of a Board of Zoning Appeals, a state legislative entity, Bills of Attainder and as such prohibited under U.S. Const. art. I, §10?
2. If these state entitles, referred to at Boards of Zoning Appeals in Virginia or entities of a similar character and function, are to avoid having their decisions voided as unconstitutional because they are Bills of Attainder, what level of procedural due process is required?
3. If the decisions of these Boards of Zoning Appeals are not Bills of Attainder must the Board of Zoning Appeals conduct its hearings in a "quasi-judicial manner?
4. What are the procedural due process requirements of a legislative body acting in a quasi-judicial capacity?
5. Is the exclusion of necessary parties proper during a quasi-judicial hearing, by a legislative body?
6. Is the exclusion of necessary parties proper during the appeal of a decision of a Board of Zoning Appeals or any other state legislative entity, which performs an equivalent function?
7. What criteria should be used to determine if a party is a necessary party during a zoning hearing or during an appeal of said zoning hearing decision?

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James Jackson, Petitioner
Fairwood Acres Citizens Association, Petitioner
Cora Jackson, Petitioner
Carolyn Dougherty, Petitioner
John Dougherty. Petitioner
Cliff Krug, Petitioner
Kathy Krug. Petitioner
Diane Schute. Petitioner
Adrian Murray, Petitioner
Michelle Murray, Petitioner
John Waylonis, Petitioner
David Bucci, Petitioner
Dale Bucci, Petitioner
Charles Newton, Petitioner
Barbara Newton, Petitioner
Yota Kitsantas, Petitioner
Mark Benson, Petitioner
Gary Pisner, Petitioner
William Coffman, Petitioner
Bradley Golden, Petitioner
Peggy Golden, Petitioner
William Sidenstick, Petitioner
Joseph Dickman, Petitioner
Judy Dickman, Petitioner
Louis Rosato, Petitioner
Mary Rosato, Petitioner
William Von Holle, Petitioner
Elizabeth Von Holle, Petitioner
Fairfax County Board of Zoning Appeals. Respondent
The Trustees of Antioch Baptist Church, Respondent

CITATIONS OF OPINIONS AND ORDERS IN CASE

The unpublished decision of the Fairfax County Board of Zoning Appeals can be found in the Appendix (Reprinted in Exhibit A); this decision was appealed.
The unpublished dispositive order of the Appellate Court, the Circuit Court of Fairfax County Virginia, can be found in the Appendix (Reprinted in Exhibit B).
The pertinent part of the Appellate Court's decision was taken from the transcript (page 81) of the dispositive hearing can be found in the Appendix (Reprinted in Exhibit C).
The unpublished Request for Reconsideration of the dispositive order of the Appellate Court, the Circuit Court of Fairfax County Virginia can be found in the Appendix (Reprinted in Exhibit D).
The unpublished order of the Virginia Supreme Court denying Petitioners' Petition for a Writ of Certiorari can be found in the Appendix (Reprinted in Exhibit E).
The unpublished order of the Virginia Supreme Court denying Petitioners' Petition to Rehear can by found in the Appendix (Reprinted in Exhibit F).

JURISDICTIONAL STATEMENT

The Supreme Court of the Commonwealth of Virginia entered an order denying Petitioners' Petition for a Writ of Certiorari, on February 20, 2008, to review the decision of the Circuit Court of Fairfax County Virginia, which had been acting as an appellate court pursuant to Va. Code Ann.§ 15.2-

2314.[1] Petitioners timely filed a Petition for Rehearing. The Supreme Court of the Commonwealth of Virginia entered an order denying Petitioners' Petition for Rehearing on April 25, 2008. This petition was filed within 90 days of that date by first class mail on July 24, 2008, so that this Court has jurisdiction to review the judgment of the trial court on petition for certiorari rests by virtue of Section 1254(1) of the Judicial Code (28 U.S.C. § 1254(1)).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions

U.S. Const. art. I § 10 states:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

U.S. Const. amend. XIV, § 1 states:

> All persons born or naturalized in the United State , and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

[1] See Appendix Exhibit E

> they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes

Va. Code Ann. §15.2-2308 states that:

> Every locality that has enacted or enacts a zoning ordinance pursuant to this chapter or prior enabling laws, shall establish a board of zoning appeals that shall consist of either five or seven residents of the locality, appointed by the circuit court for the locality. Boards of zoning appeals for a locality within the fifteenth or nineteenth judicial circuit may be appointed by the chief judge or his designated judge or judges in their respective circuit, upon concurrence of such locality... .

Va. Code Ann. §15.2-2309 (2) states:

> 2. To authorize upon appeal or original application in specific cases such variance as defined in Va. Code Ann.

§15.2-2201 from the terms of the ordinance as will not be contrary to the public interest, when, owing to special conditions a literal enforcement of the provisions will result in unnecessary hardship; provided that the spirit of the ordinance shall be observed and substantial justice done, as follows:

When a property owner can show that his property was acquired in good faith and where by reason of the exceptional narrowness, shallowness, size or shape of a specific piece of property at the time of the effective date of the ordinance, or where by reason of exceptional topographic conditions or other extraordinary situation or condition of the piece of property, or of the condition, situation, or development of property immediately adjacent thereto, the strict application of the terms of the ordinance would effectively prohibit or unreasonably restrict the utilization of the property or where the board is satisfied, upon the evidence heard by it, that the granting of the variance will alleviate a clearly demonstrable hardship approaching confiscation, as distinguished from a special privilege or convenience sought by the applicant, provided that all variances shall be in harmony with the intended spirit and

purpose of the ordinance.

No such variance shall be authorized by the board unless it finds:

a. That the strict application of the ordinance would produce undue hardship relating to the property;

b. That the hardship is not shared generally by other properties in the same zoning district and the same vicinity; and

c. That the authorization of the variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance...

Va. Code Ann. §15.2-2314 states that:

> Any person or persons jointly or severally aggrieved by any decision of the board of zoning appeals, or any aggrieved taxpayer or any officer, department, board or bureau of the locality, may file with the clerk of the circuit court for the county or city a petition [for a Writ of Certiorari] specifying the grounds on which aggrieved within 30 days after the final decision of the board.

STATEMENT OF THE CASE

The legislature of the Commonwealth of Virginia, pursuant to Va. Code Ann. § 15.2-2308, permitted Virginia jurisdictions to create legislative entities called Boards of Zoning Appeals.

This assertion of Petitioners that these Boards of Zoning Appeals are legislative bodies is not in dispute: the Appeals Court (the Fairfax County Circuit Court), the Virginia Supreme Court in its case law, and all parties to this case concur on this point.

One of the functions of these Zoning Boards is to approve special zoning permits to build building, to modify uses of existing building, and to modify the uses of properties, by legislatively modifying local zoning ordinances.

The Loss of Property in this Case

In many instances these special permits can and do adversely affect the properties of people and other entities located in the vicinity of the property that is the subject of a special permit. Granting a special permit can result in the reduction of the value of the surrounding properties, damage to the surrounding properties, and the loss of use of the surrounding properties. Monetary losses due to reductions in properties values and due to damage to

the surrounding properties can be substantial.

On July 11, 2006, during a public hearing, the Fairfax County Board of Zoning Appeals (hereinafter "the BZA") approved an Application Number SPA 90-S-067-3 of Antioch Baptist Church (hereinafter "Applicant") for a special permit to create a very large four building church campus, with two large buildings or a single "Wal-Mart" size building in a small residential neighborhood (the Applicant declined to disclose the specifics to the BZA, to the Appeals Court and to the community). During the hearing some evidence was presented to the BZA indicating that there would be a significant loss of property values and that there would be significant damage to a large recreational lake located near the proposed construction. Even the Appeals Court (the Circuit Court) stated in its July 19 2007 decision (see July 19, 2007 dispositive hearing transcript page 80) that:

> I would concede that the evidence here was pretty weak in that the people opposed to the rezoning brought a real estate appraiser, and I think there was testimony of one person – one homeowner in the area [referring to another church in another part of Fairfax County] – that she had noticed a changed – or she noticed an increase in her value [referring to her property tax assessment] since 1990 when the original church went in. You all know, a Court might find a real estate

> appraiser's valuation is entitled to greater weight than a citizen, but certainly there was evidence in the record on both sides of that issue. And I think, of necessity, in many zoning decisions the surrounding property is going to be affected financially – any shopping center near a residential district – and I can't believe that the Comprehensive Plan – even if I were to find that there is a diminution in property value, the Comprehensive Plan says – or the Zoning Ordinance says you can't have any special permits if it reduces the value of any property. I can't believe that is the law.

The issue of potential damage to a nearby lake (Burke Lake) was raised during the BZA hearing, but BZA's procedural impediments permitted false submissions and false testimony by the Applicant and by the County Staff to go unchallenged.

Bad Procedures Undermining Laws

If one examines Va. Code Ann. §15.2-2309 (2), one is struck by the level of protection – at least on paper – given to affected property owners when a Board of Zoning Appeals determines if a special permit will be awarded, yet bad procedures and insufficient procedural due process can render a good statute impotent and this is how in this case the BZA

accomplished this:

Article VII Paragraph 1(c) of the By-laws (these By-Laws were created by the BZA Board members) of the Board of Zoning Appeals of Fairfax County states that: "No cross-examination or questions of speakers testifying shall be permitted, except by members of the BZA, without the permission of the Chairperson." This constraint does not permit those who are in opposition to an application to challenge the statements or the credentials of those who are called on by the members of the BZA for their expert opinion and/or factual testimony. There were many instances during the hearing where the lack of a right to cross–examine or even speak, by those opposed to the granting of the special permit, led to erroneous testimony, by the Applicant and by Fairfax County Staff, being injected into the proceeding.

For example, in the hearing that is the subject of this petition, the record shows that Health Department Staff proffered inaccurate opinion testimony; The Petitioners had evidence that the testimony was in error, yet there was no mechanism built into the procedures in the By-laws to correct such faulty statements or to challenge the Health Department's Representative's credentials, as would be available in a court of law; because of this, these errors permeated the record and they could not be brought to the attention of the Board during the hearing.

There was a second instance relating to a

transportation related question where, during the hearing, an employee of the Department of Planning and Zoning Administration of Fairfax County (Zoning Staff) was permitted to give hearsay testimony about expert opinions of a third party, who was not even present at the hearing; this would not be permitted in a court of law. There was no right to challenge the faulty hearsay testimony of the speaker or of the person that allegedly made the statement by cross-examination or by any other means.

There were instances during the hearing, where the Board permitted hearsay testimony relating to the level of compliance with the Zoning Ordinance of Fairfax County, where an employee of the Department of Planning and Zoning Administration of Fairfax County was permitted to give hearsay testimony about the expert opinions of a third party who was not present at the hearing; this would not be acceptable in a court of law.

Also, the Fairfax county health department gave hearsay testimony about the septic system capacity withholding from the BZA the fact that capacity calculations were done by a contractor for the Applicant and not the alleged expert witness. Again there was no right to challenge the faulty hearsay testimony of the speaker or of the person that allegedly made the statement or the credentials of this alleged expert witness by cross-examination or any other means; the procedures prevented that.

In addition to the prohibition on cross-examination, during the hearing, there was also a prohibition on objecting to testimony and correcting

faulty statements. There was one glaring incident during the hearing relating to the By-laws Article VII (9) testimony procedure; without any foundation, Counsel for Applicant gave expert testimony, which was incorrect and there was no mechanism in the By-laws for objecting, correcting, or challenging Counsel for Applicant's obvious lack of expertise; although the lawyer had no technical expertise, he was permitted to give opinion testimony on a technical issue; the lawyer's statements were technically incorrect, yet one was not permitted to object to the lawyer's testimony.

There was another incident where one of the members of the BZA made an incorrect statement during the hearing. The Board member made the following factually incorrect statement "on the wetlands issue, I think that I appreciated the concern that the citizens had. I'm certainly not an expert on that. I'm concerned about it, but I feel that if the Corps of Engineers has passed on this"; this highly prejudicial and incorrect statement may have led to the granting of the special permit by the BZA (it was a four to three decision), yet given that the By-laws offered no mechanism for correcting such an incorrect allegation during the hearing, the BZA's By-laws are very defective from a procedural due process standpoint.

Also, from the record of the hearing it is clear that the members of the Board used information acquired from written sources and from ex parte communications that were not within the record, and therefore not made available to the public for comment. Also, individuals, who were opposed to the

Application, were not given full access to the staff that prepared the staff reports. Due to this lack of access, the Petitioners were unable to correct the errors and the misstatements in the Staff Report – especially, given the fact that the report was issued late in the day on June 30, 2006, and none of the Petitioners were able to review the report until July 3, 2006.

Also, as in this case, Applicants were permitted to make substantial yet vague changes in their applications days before a hearing. There are no restrictions in the By-laws on modifying an application just prior to a hearing and there are no notice requirements when there are substantial changes; this is prejudicial to those opposing an application.

These ex parte communications are improper; as is the use, by the Board of Zoning Appeals, of documents that are not on the record or which are not available to the public until the last minute. "The public hearing requirement presupposes that the entire body of evidence relied on by the board to reach its decision must be presented at the open proceedings thereby providing every interested person with an opportunity to either support or object to any particular evidence. Thus the board may not depend on evidence not introduced at the hearing" (See Wasicki v. Zoning Bd. Of City, 163 Conn. 166, 302 A. 2d 276 (1972)).

Also, there is the procedural due process issue in the bias in the amount of time the Board of Zoning

Appeals allocates for testimony pursuant to Article VII (4) of the By-laws of the Fairfax County BZA the "Applicant and/or their authorized agent or attorney are permitted a ten (10) minute presentation of their position, while a designated representative of those opposed to the application are not given an equivalent amount of time.

Also, the Attorney representing the community was not permitted to represent those opposed to the special permit without forfeiting his right to testify.

Article VII (6) of the By-laws of the Fairfax County BZA states that individuals will be permitted to testify for a maximum of three minutes, and a single representative of a civic or homeowners association is given five minutes; this three minute limit undermines those opposing an application from effectively using experts, because three minutes is insufficient time for a technical witness to educate the members of the Board; it takes considerably more time to convey technical information.

In Article VII (8) of the By-laws of the Fairfax County BZA, at the end of testimony, the applicant, their authorized agent, or attorney is given five minutes for rebuttal, or to make additional remarks; those opposing the application, are not given any additional time; this is another procedural asymmetry that gives an improper advantage to the Applicant. Also, expert testimony by the Zoning Staff can be of an unlimited duration and the technical staff or the Zoning Staff are not subject to any questioning of their opinions or their credentials by those citizens opposing an application -- this is

improper.

Other procedural deficiencies included the Applicant's submission of documents during the BZA hearing; these documents were not made available to those opposing the special permit, but was made available to the members of the BZA; even more disturbing is the fact that, as indicated in Petitioners' August 4, 2007 Request for Reconsideration in the Appeals Court (the Circuit Court), some of the documentation that was submitted to the BZA contained false data.

Also, in the BZA's decision, most of the findings did not correspond with the hearing testimony or to any technical document; that is what you get when there is a lack of procedural due process.[2]

Finally, a necessary party, the owner of the lake that would be damaged by the granting of the special permit, the Virginia Department of Game and Inland Fisheries (hereinafter "VDGIF") was never given any formal notice of the BZA hearing and to add to this oversight the Appeals Court refused to include the necessary party VDGIF in the Appeals Court proceedings apparently because of scheduling issues (See findings in Exhibit C in Appendix).

In summary, due to the numerous procedural rules created by the BZA Board Members and implemented by the BZA during the July, 11, 2006 hearing and notice oversights, those opposing the special permit were bared from correcting statements from the BZA which were contrary to the record,

[2] See findings in Exhibit C in Appendix

were bared from questioning the credentials and testimony of those giving expert testimony – including the alleged expert testimony of the Attorney representing the Applicant, were barred from objecting to the extensive use of hearsay expert testimony, much of which was false, and were bared from reviewing written submissions by the Applicant, which contained erroneous information. That is how procedural deficiencies and lack of due process nullified a good law as it did in this instance.

The lack of procedural due process during the BZA hearing was raised initially in Petitioners' Petition for a Writ of Certiorari, which was filed on August 10, 2006, appealing the decision of the BZA to the Circuit Court of Fairfax County pursuant to Va. Code Ann. §15.2-2312 and was argued throughout the Circuit Court proceeding; it was also argued in both of Petitioners' submittals to the Virginia Supreme Court (the Petitioners' Petition for a Writ of Certiorari and Petition to Rehear).

How the Appeals Court Addressed BZA's Lack of Procedural Due Process and Created a New Constitutional Problem

Petitioners had argued on appeal that the BZA hearing was quasi-judicial and because the BZA hearings were quasi-judicial there were procedural due process requirements. The Court, in its July 19, 2007 decision rejected Petitioners' position when it stated that the BZA hearing was not quasi-judicial, but it was a "legislative hearing" and political with limited due process as described in "McIntyre v. Plunkett, 250 Va. 27," (this case was incorrectly

cited by the court; it has nothing to do with procedural due process).

Because the BZA hearing was a "legislative hearing" rather than a quasi-judicial hearing , Petitioners were, according to this Court, guaranteed only notice and a hearing (this right to notice and a hearing is purely statutory); thus pursuant to the Appeals Court's theory, by labeling the BZA hearing as a "legislative hearing," the Court could dismiss any procedural due process issue and reason that – no abuse by the Board, no right deprived, no error made, no conflict of any size will negate the actions of the Board because it is a mini-legislature and like a legislature there are no formal controls or limitations. Apparently the Virginia Supreme Court, by denying Cert concurred with the Appeals Court, although it contradicted the Court's own dicta in Blankenship v. City of Richmond, 188 Va. 97, 104-05, 49 S.E.2d 321, 325 (1948).

By labeling the BZA procedure as legislative and not quasi-judicial the Appeals Court disposed of the procedural due process problem that might have existed if the BZA hearing was quasi-judicial, yet the decision of the court created a new constitutional problem.

As Petitioners pointed out in their August 9, 2007 Circuit Court Request for Reconsideration, in its Virginia Supreme Court Petition for a Writ of Certiorari, and in its Petition to Rehear:

> 'Given that the BZA hearing can be punitive, in that people can and do suffer a financial loss because of a decision of the BZA, if the BZA hearing is legislative, its decision is a bill of attainder and thus unconstitutional. If the BZA hearing is,

contrary to what the Appeals Court has stated in its decision, quasi-judicial than the BZA, due to its restrictive procedures lacked sufficient procedural due process than again the BZA hearing is unconstitutional.. ."

ARGUMENT FOR ALLOWANCE OF WRIT

The decision below should be reviewed because the Appeals Court and the Virginia Supreme Court by denying Petitioners' Petition for a Writ of Certiorari concluded that a legislative body, the Fairfax County Board of Zoning Appeals, was acting procedurally as a legislature during a dispositive hearing; therefore, those people who could suffer financial harm had no procedural due process rights, but only those rights specifically enumerated in the Virginia Code. Other states with legislative entities of the same or similar function of the Virginia Boards of Zoning Appeals approach these hearings as quasi-judicial proceedings and as such these states recognize that these proceedings must have a certain level of procedural due process, particularly because the actions of these boards can result in financial loss, the loss of the use of property, or physical and environmental damage to their property, for the few who own property near a construction that excessively deviates from the norms of a community – but not the Commonwealth of Virginia.

The Board of Zoning Appeals Bill of Attainder

Without a substantial infusion of procedural due process these Virginia Boards of Zoning Appeals legislative hearings are no different from what one would have seen in the 18th century British Parliament or in pre-constitution America, during legislative sessions, where Bills of Attainder

were generated by a legislative body that deprived an individual or a select few of their life, their liberty or their property during sessions laced with innuendo, hearsay, false statements, and false evidence, where the parties who will suffer the loss were either excluded from the legislative proceeding or procedurally restrained from protecting their interests through their questions, corrections, and denials.

It must always be remembered that Bills of Attainder were not trivial footnote in the U.S. Constitution. One of the motivations for the American Revolutionary War was anger at the injustice of attainder. American dissatisfaction with attainder laws motivated their prohibition in the Constitution. The provision forbidding state law bills of attainder reflects the importance that the framers attached to this issue, since the United States Constitution imposes very few restrictions on a state government's power.

Within the U.S. Constitution, the clauses forbidding attainder laws serve two purposes. First, they forbid the legislature from performing Judiciary functions—since the outcome of any such acts of the legislature would of necessity take the form of a bill of attainder. Second, they embody the concept of Due Process which was later reinforced by the Fifth and the fourteenth Amendment of the United States Constitution. The motivation of the framers of the US Constitution for prohibiting Bills of Attainder can be found in Federalist Paper #44, which states:

Bills of attainder ..., are contrary to the

first principles of the social compact, and to every principle of sound legislation. [Bills of attainder are] expressly prohibited by the declarations prefixed to some of the State constitutions and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and

> influential speculators, and snares to the more industrious and less informed part of the community.

In Cummings v. Missouri, 71 U.S. 277 (1867) this Court defined a bill of attainder as:

> a legislative act which inflicts punishment without judicial trial and includes any legislative act which takes away the life, liberty or property of a particular named or easily ascertainable person or group of persons because the legislature thinks them guilty of conduct which deserves punishment."

In U.S. v. Lovett, 328 U.S. 303 (1946) this Court defined a Bill of Attainder as a:

> Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a trial, are 'bills of attainder' prohibited under this clause.

Given the procedural deficiencies of the BZA hearing, given that the hearing , which is the subject of this appeal, was according to the Appeals Court not a "judicial trial," but procedurally a "legislative

hearing," "given the monetary losses, which inflict punishment and would be directed against easily ascertainable members of a small group of people in a small community by the legislative act of the BZA (which the BZA decision was), Petitioners assert that the decision of the BZA was, in every aspect, a bill of attainder, issued by a legislative body in the Commonwealth of Virginia, and as such the decision of the BZA is unconstitutional under U.S. Const. art. I § 10.

It is unclear if the legislature of the commonwealth of Virginia gave any consideration to the possibility the legislation crated by these legislative boards were unconstitutional. Perhaps their concerns were reduced because many states use a similar mechanism for addressing zoning issues, perhaps the legislature felt that unlike the Bills of Attainder issued by the British Parliament and by the states prior to the ratification of the United States Constitution the proceeding where these zoning related legislative acts were issued would have a critical mass, from a procedural due process standpoint, to avoid the bill of attainder taint. As one can see from the present case, if that was their intent, they did not succeed and for that reason, the decision of the Board of Zoning Appeals (see Exhibit A in Appendix) should be voided as a Bill of Attainder.

Procedural Due Process and Zoning Boards

In its July 19, 2007 decision, the Appeals Court, citing to Goldberg v. Kelly, 397 U.S. 254

(1970), incorrectly concluded that there is no right to cross-examine or correct misconceptions of a fact finder during non criminal matter, except for welfare related issues. (The Trial Court indicated that Goldberg was limited to Welfare cases); this is incorrect. In instances, such as in this case, where there is a need to protect persons, not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property, procedural due process is constitutionally required (see Carely v. Piphus 435 U.S. 247, 259 (1978) and Mathews v. Eldridge 424 U.S. 319, 344 (1976)). Thus, the required elements of due process are those that "minimize substantively unfair or mistaken deprivations" by enabling persons to contest the basis upon which a state proposes to deprive them of protected interests (see Fuentes v. Shevin 407 U.S. 247, 259 (1978)). Given the potential financial loss to the community and given the potential loss to the citizens of Fairfax County and to the Commonwealth of Virginia, the right to cross-examine witnesses or even to be heard during critical stages in a proceeding, to challenge inaccurate and groundless assertions are the only means to "minimize substantively unfair or mistaken deprivations" that can arise from bad zoning decisions. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands," (see Morrissey v. Brewer, 408 U.S. 471 (1972)). In this instance the chance of mistaken deprivations was high, as such due process along with its tools, including the right to cross-examine, should have been made available to Petitioners. Even if this Court does not accept

Petitioners' argument that BZA's decision was a bill of attainder, this Court should as least hear the case so that it can prescribe the amount and type of procedural due process necessary during zoning related legislative hearings.

The Exclusion of Necessary Parties

If one reviews the record of this case one can see that most of the concerns of the BZA and of the Appellate Court was directed to Burke Lake, a 218-acre lake in Fairfax County; as the largest lake in Fairfax County, Burke Lake is a 218-acre reservoir and one of the most heavily fished lakes in Virginia. This lake is located about one mile downstream from the property that was granted the special permit in this case, yet the BZA never gave formal notice of the hearing to the owner of Burke Lake: The Virginia Department of Game and Inland Fisheries ("VDGIF"), rather it was the Petitioners who informed VDGIF of the problem special permit application; also the Appeals Court made no effort to include the VDGIF in the appellate proceedings – even when asked to do so by Petitioners. The reason why VDGIF was excluded was never made clear by the Appellate Court; however, it appeared that the Appellate Court was concerned that bringing in the VDGIF would delay the proceedings.

In its Virginia Supreme Court Brief in Opposition, Respondent argued that VDGIF does not have a legal or beneficial interest in the property subject to the Application which is likely either to be defeated or diminished by the appeal.

It was an undisputed fact that Applicant's

proposed construction will destroy wetlands and alter and eliminate parts of the watershed of Burke Lake. The VDGIF has expectations based on the Fairfax County comprehensive plain and on zoning restrictions that the watershed will not be damaged or diminished. The special permit process is a mechanism that is designed to permit an application to deviate from Fairfax County's zoning restrictions. Given that VDGIF has an interest in maintaining the watershed of its lake, which this proposed construction is part of, and the watershed will be diminished and the lake, according to testimony, will be damaged. Given due process requirements, necessary parties for both the BZA hearing and for the Appeal would be those whose property would be damaged –but again, the BZA hearing was procedurally a legislative hearing and there were no due process requirements.

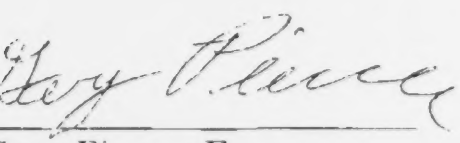
CONCLUSION

For the foregoing reasons, the decision below should be reviewed by this court. In this instance the decisions of the lower courts and the actions of the Fairfax County Board of Zoning Appeals in granting a Special Permit to Applicant was either void because it was an unconstitutional bill of attainder or invalid due to the lack of sufficient procedural due process during the BZA hearing.

Virginia is not the only state that uses legislative boards to decide zoning related issues. Given the lack of pertinent case law and given the constitutional restrictions on issuing bills of

attainders, it is unclear if the use of legislative board to decide zoning issues is proper even with a judicial level of due process; Petitioners assert that there is a need for this Court to make such a determination; moreover, it is unclear how much procedural due process is required during a legislative hearing to prevent the legislation of such a legislative body from being labeled a bill of attainder; this is another issue where there is no significant case law; it is an area of the law where there are few answers and many questions.

Respectfully Submitted,
Pisner & Pisner, Attorneys

By: 

Gary Pisner, Esq.
Attorney of Record for Petitioners

APPENDIX

Exhibit A

COUNTY OF FAIRFAX, VIRGINIA

SPECIAL PERMIT RESOLUTION OF THE BOARD OF ZONING APPEALS

TRUSTEES OF THE ANTIOCH BAPTIST CHURCH, SPA 90-S-057-03 Appl. under Sect(s). 3-103 and 3-C03 of the Zoning Ordinance to amend SP 9Q-S-057 previously approve for church to permit increase in land area, building addition and site modifications. Located at 10901 and 10915 Olm Dr., 6525 and 6531 Little Ox Rd., 6340 Sydney Rd. and 6400 Stoney Rd. on approx. 20.91 ac. of land zoned R-1, R-C and WS. Springfield District. Tax Map 77-3 ((3)) 27, 30 and 34; 87-1 ((1)) 2, 2A, 5 and 6. Ms. Gibb moved that the Board of Zoning Appeals adopt the following resolution:

WHEREAS, the captioned application has been properly filed in accordance with the requirements of all applicable State and County Codes and with the by-laws of the Fairfax County Board of Zoning Appeals; and

WHEREAS, following proper notice to the public, a public hearing was held by the Board on July 11, 2006; and

WHEREAS, the Board has made the following findings of fact:

1. The applicant is the owner of the land.
2. The four or five issues of concern were

thoroughly briefed by both sides and there was sufficient time to review the well-documented information submitted from either side.

3. The citizens' concern about the wetland issue is appreciated, but the Corp of Engineers had passed on it, and they are entrusted to have property looked at it.
4. The Department of Public Works and Environmental Services (DPWES) has passed on it, and there probably will be another review and a number of iterations on it by the County.
5. The outfall issue is a concern for all in Fairfax County, and DPWES has adopted stringent new standards to determine and figure outfalls, and there are many engineers working on it, which should address the neighbors' concerns.
6. The church will be held accountable and must monitor its stormwater management system and rain gardens.
7. The traffic issue is a problem especially on Sundays, and one sympathizes with the neighbors, but a community church has the right to exist.
8. The County's expert traffic engineer, Angela Rodeheaver, performed traffic counts; her Department thoroughly assessed it; the determinations were passed on; and although the situation is not ideal, there are other areas in Fairfax County that are not ideal on Sundays; it is part of the County's urbanization.
9. The septic system was thoroughly assessed by a Fairfax County Health Department engineer

expert who testified at length about its functions, capabilities, and reliability. It was noted that there are other larger septic fields functioning for years in the County.

10. The church is tasked with the system's continual monitoring and any possibility of a power outage, and several development conditions were added to address the matter.
11. Although it is a rather subjective view of the proposed expansion's compatibility with the residential surroundings, staff, who are professionals, have determined that it is compatible.
12. New lots were added that will have conservation easements, and the trees cannot be razed. There should be sufficient buffering.
13. It is regrettable that there will be disappointed people regardless of this case's resolution.

AND WHEREAS, the Board of Zoning Appeals has reached the following conclusions of law:

THAT the applicant has presented testimony indicating compliance with the general standards for Special Permit Uses as set forth in Sect. 8-006 and the additional standards for this use as contained in Sect(s). 3-103 and 3-C03 of the Zoning Ordinance.

NOW, THEREFORE, BE IT RESOLVED that the

subject application is APPROVED with the following limitations:

1. This approval is granted to the applicant only, Antioch Baptist Church and is not transferable without further action of this Board, and is for the location indicated on the application 6525 and 6531 Little Ox Road, 10901 Olm Drive, 10915 Olm Drive, 6400 Stoney Road and 6340 Sydney Road and is not transferable to other land.

2. This special permit is granted only for the purpose(s), structure(s) and/or use(s) indicated on the special permit plat prepared by William H. Gordon Associates , Inc., dated January 2006, as revised through June 28, 2006 sheets one (1) through seven (7) and approved with this application, as qualified by these development conditions.

3. A copy of this special permit and the Non-Residential Use Permit (Non-RUP) SHALL BE POSTED in a conspicuous place on the property of the use and be made available to all departments of the County of Fairfax during the hours of operation of the permitted use.

4. This special permit amendment is subject to the provisions of Article 17, Site Plans. Any plan submitted to the Department of Public Works and Environmental Services (DPWES) pursuant to this special permit, shall be in substantial conformance with these conditions.

Minor modifications to the approved special permit may be permitted pursuant to Par. 4 of Sect. 8-004 of the Zoning Ordinance.

5. The maximum number of seats in the main area of worship shall be 1,250.
6. There shall be no worship services in the building located on Lot 6; prior to issuance of a Non-RUP for the new sanctuary, the church pews shall be removed and this building shall be converted to a multipurpose ministry building with ancillary support uses.

7. Parking shall be provided as depicted on the special permit plat. All parking shall be on site. There shall be no overflow parking permitted along adjacent subdivision streets. The applicant shall make all members aware of this restriction. In addition, the applicant will encourage car-pooling among its members and shall designate a person within the church administration to act as a point of contact for neighbors with traffic concerns.

8. Transitional screening shall be modified along all lot lines to permit existing vegetation to satisfy the requirements, but shall be supplemented as shown on the plat, with the following additions:

    - In the event that a storm sewer easement is not required on adjacent Lots 28 and 29, the easement area shown on the plat shall be planted with shrubs along the northern lot line as shown on the Landscape Plan. If an easement is required and obtained to

allow a drainage swale in lieu of a storm sewer pipe, a barrier shall be installed on the subject

property across the cleared area within the plantings, subject to approval of DPWES, on the north side of the barrier to minimize the view of the subject property.

- Transitional screening consisting of a minimum of 25.0 feet in width shall be provided on the southern edge of the proposed septic drainage, along Little Ox Road to shield the view of the parking area and buildings from the road.

Notwithstanding that which is shown on the plat, the extent of tree preservation shall be the greatest extent possible on-site, as determined by the Urban Forest Management (UFM), DPWES, and supplemental plantings over and above that which is shown on the plat as determined by UFM. The size, species and location of all supplemental and transitional screening plantings shall be determined in consultation with UFM and shall provide at a minimum Transitional Screening 1 along the northern and southern lot lines of Lot 2 and 2A and the northern lot lines of Lots 5 and 34.

A tree preservation plan shall be submitted to the UFM for review and approval at the time of site plan review. This plan shall designate, at a minimum, the limits of clearing and

grading as delineated on the special permit plat in order to preserve to the greatest extent possible individual trees or tree stands that may be impacted by construction.

All trees shown to be preserved on the tree preservation plan shall be protected by tree protection fencing a minimum of four feet in height to be placed at the dripline of the trees to be preserved. Tree protection fencing in the form of a four foot high 14 gauge welded wire fence attached to six foot steel posts driven

18 inches into the ground and placed no further than ten feet apart, shall be erected at the final limits of clearing and grading and shown on the erosion and sediment control sheets. Tree protection fencing shall only be required for tree save areas adjacent to clearing and grading activities. The tree protection fencing shall be made clearly visible to all construction personnel. The fencing shall be installed prior to any construction work being conducted on the application property. A certified arborist shall monitor the installation of the tree protection fencing and verify in writing that the tree protection fence has been properly installed. Three days prior to commencement of any clearing and grading. UFM shall be notified and given the opportunity to inspect the site

to assure that all tree protection devices have been correctly installed.

9. Foundation plantings and shade trees shall be provided around the church building to soften the visual impact of the structures. The species, size and location shall be determined in consultation with UFM.
10. The barrier requirement shall be waived, except for Lot 6 and as qualified by these conditions.

11. Interior and peripheral parking lot landscaping shall be provided, at a minimum, in conformance with the requirements of Article 13 of the Zoning Ordinance. Size, species and number of all plantings shall be determined in consultation with UFM, at the time of site plan review.

12. The limits of clearing and grading shall be no greater than as shown on the SP Plat or as modified by these conditions and shall be strictly adhered to. A grading plan which establishes the final limits of clearing and grading necessary to construct the improvements shall be submitted to UFM, for review and approval. Prior to any land disturbing activities, a

pre-construction conference shall be held

between DPWES, including UFM, and

representatives of the applicant to include the construction site superintendent responsible for the on-site construction. In no event shall any area on the site be left denuded for a period longer than 14 days except for that portion of the site in which work will be continuous beyond 14 days.

13. Stormwater Management and Best Management Practices facilities shall be provided as determined by DPWES. Low Impact Design (LID) facilities shall be provided as described on the plat, and as approved by DPWES. The underground Stormwater Management/Best Management Practices facility may be reduced in size or removed if it is determined by DPWES that the LID facilities can adequately accommodate storm water volume and quality requirements. The applicant shall enter into an agreement with DPWES, in such a form as required by DPWES, at the time of site plan approval that sets forth a maintenance schedule and procedure for the underground detention facility.

14. Right-of-way dedication shall be provided as depicted on the plat or as determined by the Department of Transportation and the Virginia Department of Transportation (VDOT). The right-of- way shall be dedicated for public street purposes and shall convey to the Board of Supervisors in fee simple on demand or at the time of site plan approval, whichever occurs first.

15. Any proposed lighting shall be provided in accordance with the Performance Standards contained in Part 9 (Outdoor Lighting Standards) of Article 14 of the Zoning Ordinance. Outdoor lighting fixtures shall not exceed twelve (12) feet in height from the ground to the highest point of the fixture, shall be of low intensity design and shall utilize full cut-off fixtures which focus directly on the subject property. Parking lot lighting shall be turned off one-half hour after any event held at the church. Outdoor building-mounted security lighting shall be shielded to prevent off-site glare.

16. The applicant shall obtain a sign permit for the proposed sign, which shall comply with the provisions of Article 12 of the Zoning Ordinance.

17. The applicant shall exercise diligent attempts as determined by VDOT to abandon Stoney Road, where it bisects the subject application property, subject to approval of VDOT. Should the abandonment be approved, the applicant shall scarify the existing road pavement and re-vegetate the area, while allowing unimpeded pedestrian traffic from Lot 6 to the adjacent application properties. The applicant shall scarify and re-vegetate the roadway in accordance to procedures approved by UFM.

18. In order to ensure safe and expedient access to and from the church during Sunday morning church services, the applicant shall provide police assistance for traffic control. The police shall direct traffic at the main entrance to the Church. Additionally, the applicant shall install directional signs on site to assist motorists entering and existing the property.

19. The dwelling on Lot 27 shall be used only as a residence and occupied only by an employee or member of the church and his/her family,

20. The proposed septic drainfield shall be subject to review by the Fairfax County Health Department. Groundwater mounding and nitrate loading calculations shall be conducted and

shall meet the required standards of the County and the State. Groundwater monitoring wells shall be provided in the areas shown on the special permit plat or in areas designated by the County, Pretreatment of effluent shall be provided. Finally, an equalization tank shall be utilized to mitigate peak flows. If the proposed septic drainfield cannot accommodate the application proposal,

the applicant shall be required to apply for a special permit amendment

21. If determined necessary by VDOT at the time of site plan approval, to provide storage capacity, the applicant shall design and construct a left turn lane on Little Ox Road, within the existing right-of-way, into the main entrance of the property.

22. The applicant shall conduct a Phase I Archaeological Study of the application property, and provide the results of such studies to the Cultural Resource Management and Protection Section (CRMPS) of the Fairfax County Park Authority. If deemed necessary by CRMPS, the Applicant shall conduct a Phase I Archaeological Study of the application property, and provide the results of such studies to the Cultural Resource Management and Protection Section (CRMPS) of the Fairfax County Park Authority. If deemed necessary by CRMPS, the Applicant shall conduct a Phase II and/or Phase III Archaeological Study on only those areas of the application property identified for further study by CRMPS. The studies shall be conducted by a qualified archaeological professional approved by CRMPS, and shall be reviewed and approved by CRMPS.

23. The applicant will have septic field monitoring reports prepared by an independent consultant approved by Fairfax County Department of Health. Said monitoring reports shall be

prepared in writing by the consultant and submitted to the Health Department on a monthly basis for a period of two years

commencing on the issuance of the occupancy permit for the new sanctuary. Thereafter, monitoring reports will be submitted periodically as required by the Health Department.

24. The applicant shall notify the Health Department immediately when the septic system exceeds capacity or fails.

25. In the event of failure of the septic system, the applicant shall discontinue its operations immediately until it can bring the septic system into compliance with applicable Health Department standards and obtain the approval of the Health Department before resuming operations.

26. The building construction shall be generally consistent with the architecture presented in the revised concept elevation in the staff report (Attachment 1). The building will utilize residential type materials such as brick, siding, and asphalt shingles or metal roof or other building material, residential in character, to complement the surrounding community. The design shall incorporate elements such as hip roofs in segmented masses so as to reduce the apparent scale.

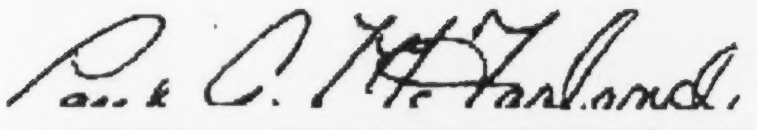
These conditions supersede all previous conditions. This approval, contingent on the above-noted conditions, shall not relieve the applicant from compliance with the provisions of any applicable ordinances, regulations, or

adopted standards. The applicant shall be responsible for obtaining the required Non-Residential Use Permit through established procedures, and this special permit shall not be valid until this has been accomplished.

Pursuant to Sect,8-015 of the Zoning Ordinance, this special permit shall automatically expire, without notice, thirty (30) months after the date of approval unless construction has commenced and been diligently prosecuted. The Board of Zoning Appeals may grant additional time to establish the use if a written request for additional time is filed with the Zoning Administrator prior to the date of expiration of the special permit. The request must specify the amount of additional time requested, the basis for the amount of time requested and an explanation of why additional time is required.

Mr. Ribble seconded the motion, which carried by a vote of 4-3. Mr. Beard, Mr. Byers, and Mr. Ribble voted against the motion.

A Copy Teste:



Paula A. McFarland, Deputy Clerk
Board of Zoning Appeals

ATTACHMENT 1

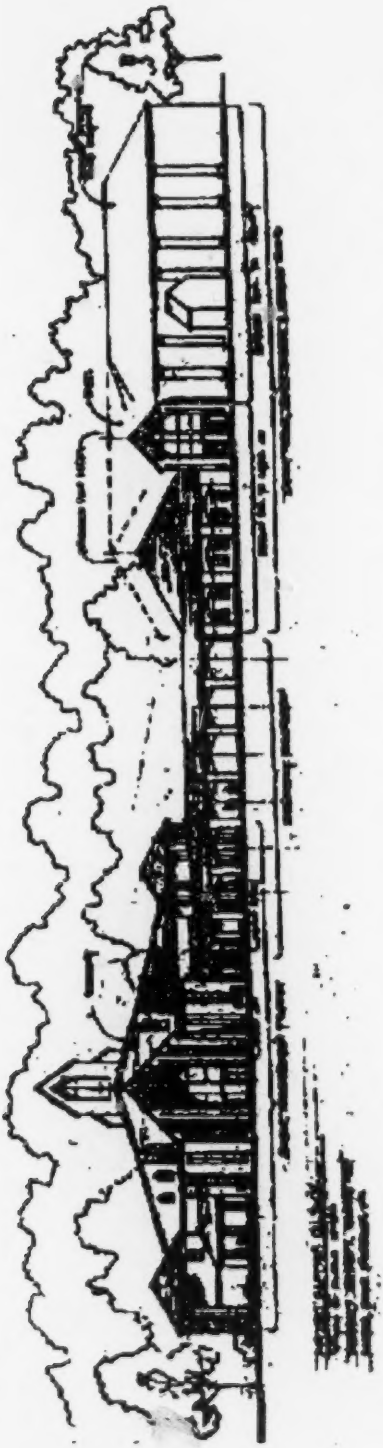


Exhibit B

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JAMES JACKSON, et al,)

Petitioners)

v.) Case No. CL2006-10122

BOARD OF ZONING APPEALS,)

Respondent)

ORDER

THIS MATTER came on this day to be heard upon the pleadings filed, the brief of the parties, a hearing on the merits, and argument of counsel; and

IT APPEARING to the Court that the Petition should be denied, that there were no erroneous principles of law applied by the Board of Zoning Appeals of Fairfax County in the

approval of the subject Special Permit, SPA 90-S-057-3, nor is the decision plainly wrong and in violation of the purpose and intent of the Zoning Ordinance; it is, hereby

ADJUDGED, ORDERED and DECREED that the decision of the Board of Zoning Appeals of July 11, 2006 in SPA 90-S-057-3 is affirmed; and

THIS ORDER IF FINAL.

7-19-2007

Entered

JUDGE

WE ASK FOR THIS: Reed Smith LLP

By: _____

Grayson P. Manes (VSB # 6614)
3110 Fairview Park Drive, Suite 1400
Falls Church, Virginia 22042
Telephone: 703-641-4292
Facsimile: 703-641-4340

E-Mail: ghanes@reedsmith.com
Counsel for Intervener
The Trustees of Antioch Baptist Church

_____

Elizabeth D, Whiting (VSB # 15452)
241 Edwards Ferry Road, N.E.
Leesburg, VA 20176
Counsel for the Clerk of the Board of Zoning
Appeals and James R. Hart

SEEN & OBJECTED TO:

_____

Gary S. Pisner (VSB 30692) 6439 Little Ox Road
Fairfax Station, VA 22039 Telephone: 703-220-1432
Facsimile: 703-842-5340 E-Mail: gpisner@aptcs.com
Counsel for the Petitioners

resolution of that question unreasonable. Transportation. This document, which I believe starts at -- Is it 424 of the record, sir?

MR. HANES: That's correct, sir.

THE COURT: It is really persuasive on that issue. I thought that was handled really well by the Respondent in that, in fact, the traffic has decreased dramatically with the improvement of Route 123. Also the plan as approved by the BZA takes into account whether or not Stoney Road is going to be abandoned. I don't think there is any question but that the special permit is in harmony with the neighboring

properties.

With respect to procedure, Petitioner cites the Goldberg case. I am told that case has been limited in its terms to Social Security rights by subsequent decisions. But that issue aside, I think your reliance is misplaced, because this clearly is a legislative hearing. And the due process in a legislative hearing, I think, is quite well set out in McIntyre versus Plunkett, 250 Va 27. You have a right to notice, you have a right to opportunity to be heard, and you have a right to a decision. There is no right to cross examine, there is no right to object to the

Exhibit D

VIRGINIA:
IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

J AMES JACKSON, et ah	)	
	)	
Petitioners,	)	
	)	
v.	)	CL
No.: 2006-10122		
	)	
BOARD OF ZONINC APPEALS, et al,	)	
	)	
	)	
Respondents.	)	
	)	

ORDER

THIS MATTER CAME ON the Petitioners' Motion for Reconsideration of the Court's rulings on July 19, 2007; it is therefore

ADJUDGED, ORDERED and DECREED that the Petitioners' Motion for Reconsideration of the Court's rulings on July 19, 2007 is denied.

ENTERED THIS 17 DAY OF Aug, 2007

C. J. Maxfield

Judge Charles J, Maxfield

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF HIE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.

Exhibit E

Wednesday 20th February,2008.

James Jackson, et al., Appellants,

against Record No. 072147
Circuit Court No. CL-2006-0010122

Board of Zoning Appeals of
Fairfax County, et al., Appellees.

From the Circuit Court of Fairfax County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:
Patricia L. Harrington, Clerk

By:
Deputy Clerk

Exhibit F

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 25th day of April, 2008.

James Jackson, et al., Appellants,

against Record No. 072147
Circuit Court No. CL-2006-0010122

Board of Zoning Appeals of
Fairfax County, et al., Appellees.

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgment rendered herein on the 20th day of February, 2008 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:
Patricia L. Harrington, Clerk

By: original order signed by a
deputy clerk of the Supreme Court
of Virginia at the direction of the Court

Deputy Clerk